Since he arrived at two different values, he took the average between them for the purpose of valuing the other two lots. By deducting 5% from the average, he valued Lot 402 at $14,844/- per acre and by deducting 10% therefrom, he valued Lot 764 at $14,844/- per acre. As a result, the value of each of the two lots is higher than Lot 1954. That should not be the case.

We are satisfied that the learned Judge has applied the correct prinicple firstly, in considering the evidence of the sale of the subject lots apart from sales of neighbouring lots and, secondly, in making due allowance for all the circumstances by allowing the average increase of the price per annum based on the valuation reports. However, we cannot say that he has adopted the right approach.

Instead of treating Lots 1954 and 1955 separately and giving them different valuations, he should have considered the average value straightaway. As stated earlier, Lot 1954 was sold about two years prior to that at $8,000/- per acre and Lot 1955 was sold about three years prior at $11,000/- per acre. The average of the two lots would be $9,500/- per acre and the average years of sale would be 2½ years. At 25% increase in value per annum, it would give a mean average of $15,500/- per acre. In our view in the circumstances of this case, this sum is a true reflection of the price that a willing owner who is not obliged to sell might reasonably expect to obtain from a willing purchaser with whom he was bargaining for sale and purchase of the said lands. (See *Nanyang Manufacturing Co.* v. *The Collector of Land Revenue Johore*[1] and *Kailas Chandra* v. *Secretary of State*[2]).

It should follow from the above for the purpose of valuing the two remaining lots, Lot 402 should be $14,725/- per acre (a deduction of 5%) and Lot 764 should be $13,950/- per acre (a deduction of 10%).

In the circumstances, we allow the appeals. The awards by the learned Judge are set aside and substituted by the following:—

(1) The sum of $15,500/- per acre for Lot 1954 and Lot 1955 respectively;

(2) The sum of $14,725/- per acre for Lot 402; and

(3) The sum of $13,950/- per acre for Lot 764.

There will be no order as to costs. Since the compensations awarded by us in appeal Nos. 59/83, 60/83, 61/83 and 62/83, except for Civil Appeal No. 58/83, exceed the sum awarded by the Collector, we direct the appellant in the above mentioned appeals to pay to the respondents herein interest on the excess at 6% per annum under section 48 of the Land Acquisition Act 1960. Similarly, the respondent in Appeal No. 75 of 1983 is ordered to pay to the appellant herein interest on the excess at 6% per annum.

Order accordingly.

Solicitors: *Balendran, Chong & Bodi; Zuki, Ghani & Amin.*

CREDIT CORPORATION (MALAYSIA) BHD. v. K. M. BASHEER AHAMED & ANOR.

[F.C. (Abdul Hamid C.J. (Malaya), Mohamed Azmi & Syed Agil Barakbah F.JJ.) April 17 & September 28, 1984] [Kuala Lumpur – Federal Court Civil Appeal No. 259 of 1982]

Contract – Lease of photostat machine – Defective machine – Liability of lessee to pay rental – Disposal by lessor not by bona fide sale – Damages.

In this case at the request of the respondents, the appellant purchased a photostat copier machine and leased it to them for a term of 36 months for the total rental of $13,623.84 payable in the sum of $378.44 per month. At the expiration or sooner determination of the lease the appellant as the owner was entitled to take back the machine and dispose of it. Two days after installation in the respondent's premises the machine broke down. It became defective thereafter in spite of constant servicing, repairs and replacement of parts by the supplier at the request of the respondents and with the knowledge of the appellant. As a result, the respondent's business was adversely affected resulting in losses. The respondents stopped paying the monthly instalments. The appellant exercised its rights under the agreement and took custody of the machine. The appellant brought an action and claimed the total rental as specified in the agreement less that already paid. The President of the Sessions Court gave judgment for two months' arrears of rental and the appeal of the appellant was dismissed in the High Court. The appellant appealed to the Federal Court.

Held, dismissing the appeal: (1) in the circumstances there was more than sufficient ground for the appellant to have taken action against the suppliers for damages and the respondents were not obliged to continue paying the total specified rental;

(2) the appellant had also committed a breach of the agreement in failing to dispose of the machine by means of a *bona fide* sale according to the stipulation therein.

FEDERAL COURT.

K. Anantham for the appellant.
D.P. Vijandran for the respondent.

Cur. Adv. Vult.

Syed Agil Barakbah F.J. (delivering the Judgment of the Court): This appeal relates to a lease agreement of a Toko Plain photostat copier machine executed between a finance company, Credit Corporation (Malaysia) Berhad (the appellant), and the managing partner of Selangor Book Centre (the first respondent) on April 4, 1979. At the request of the respondents, the appellant purchased the machine and leased it to them for a term of 36 months for the total rental of $13,623.84 payable in the sum of $378.44 per month w.e.f. April 4, 1979 and thereafter on the 4th of each succeeding month till March 3, 1982. At the expiration or sooner determination of the lease, the appellant as the owner was entitled to take back the machine and dispose of it. Two days after installation in the respondents' premises, the machine broke down. It became defective thereafter inspite of constant servicing, repairs and replacements of parts by the supplier, Laijin Corporation Sdn. Bhd., at the request of the respondents and with the knowledge of the appellant. (See pages 62 to 80 inclusive of the appeal record). As a result, the respondents' business was adversely affected resulting in losses. The respondents stopped paying the monthly instalments. The appellant exercising its right under clause 5 of the agreement took the machine into custody on October 1, 1979 and issued a custody notice as required on October 2, 1979, claiming the whole amount of rent still unpaid, storage and custody charges and costs, etc. (See page 54 of record). Thirty days thereafter, on the failure of the respondent to pay the same amount and obtain redelivery of the machine, the appellant sent another notice dated November 2, 1979 treating the respondents' action as repudiation of the lease agreement and refusal to be bound further by it. (See page 55 of record).

The appellant's claim as plaintiff in the Sessions Court Kuala Lumpur, *inter alia,* for the total rental specified in the schedule to the agreement (see page 47 of the record) less that already paid was scaled down by the learned President who heard the case, to two months arrears of rental amounting to $756.88 with interest thereon at the rate of 16% per annum from July 29, 1980 up to the date of realisation. Being dissatisfied with the said decision, they appealed to the High Court against it.

The only issue for determination by the learned Judge was whether the appellant was entitled to the whole of the rentals as stipulated in clause 8 of the lease agreement. He agreed with the learned President, dismissed the appeal and confirmed the judgment of the Court below. Hence the present appeal to us on the same issue. Having gone through the record and after hearing the submissions of the learned counsel, we agree with respect with the decision of the learned Judge. We would first quote what he said in his judgment:

"The machine was leased to respondent on 4.4.1979. The appellant repossessed it on 1.10.1979. The machine was subsequently sold to a motor company in Malacca (page 19 of Appeal Record).

The learned President found that the respondent was in breach of Clause 4 of the Agreement (relating to payments) (see page 22 of Appeal Record). But the learned President also found that the appellant was in breach of Clause 8 of the Agreement (conceded throughout the proceeding) in that the machine was not sold by public auction nor sold to a trader "dealing in goods of similar description". Because of this the learned President disallowed the recovery of all rentals in the schedule and allowed only recovery of the unpaid rentals for two months.

In my view the learned President's award could also be supported by the circumstances of the breach of Clause 4. The breach was preceded by a written complaint on the defectiveness of the machine made by the respondent on 30/8/1979 (see page 17 of Appeal Record). Secondly, there was also evidence that the respondent had long wanted to surrender the machine because of poor service (see page 18 of Appeal Record). Finally, it was also in evidence that the machine broke down two days after installation and the constant breakdown adversely affected the business of the respondent. Apparently after some telephone conversations between the respondent and the appellant the machine was taken away on 1/10/1979. By then four months rental had been paid. The rentals unpaid prior to repossession were rentals for the months of August and September, 1979.

Thus on the evidence it was never seriously disputed that the machine was defective. It was also in evidence that the surrender of the machine was initiated by the respondent himself. In my opinion the appellant should not be allowed to rely on Clause 9 of the Agreement which seems to be clearly one-sided in terms and unconscionable in effect."

It is apparent that the Judge based his conclusion on the undisputed facts and the circumstances

of the case which, in his view, rendered it unjustifiable to allow the appellant to rely on clause 9. He has, however, not given his reasons on the law. Before we do so, we feel it appropriate to reproduce three of the clauses in the agreement relevant to the issue:

"4. I further agree: (a) to make all payments to your office to which this offer is addressed or such other place as you may direct in writing and any payments otherwise made shall constitute the person receiving the same my agent; (b) to pay interest at the rate of 16% per annum on any moneys payable hereunder Which may from time to time be overdue; (c) to pay you any expenses you may incur by reason of your retaking or attempting to retake possession of the goods; (d) to repay to you on demand any moneys which you may think fit to pay to make good any failure by me to comply with any obligations hereunder or any other obligation incurred by me in respect of the goods and any other expense you may incur in the enforcement or protection of your rights hereunder or in the goods including (among other things) moneys paid by you in releasing any lien claimed over the goods in dismantling and removing the goods from any premises and in any repair or renovation to any such premises; . . . . . .

8. In the event of your acceptance of any repudiation of of the lease by me (whether such repudiation occurs as provided in Clause 5 hereof or otherwise) my liability to you for the payment of the total rent specified in the Schedule hereof and for any other moneys then payable to you under the terms and conditions of this lease agreement shall not be affected and I shall pay upon demand a further sum equal to the amount (if any) by which the amount of the residual value of the goods as stated in the Schedule hereto exceeds the amount of the nett proceeds of sale of the goods upon a *bona fide* sale by you of the goods at public auction without reserve or to or through a trader dealing in goods of a similar description. Such sum shall bear interest at the rate of Sixteen Dollars ($16) per centum per annum from the date of demand until payment. Upon payment to you of that sum and interest thereon together with the unpaid rent and other moneys as aforesaid I shall be relieved of all liability to you for rent or other moneys under the agreement and damages for breach of my agreement with you.

9. I warrant that before signing this offer I have examined the goods and have satisfied myself as to their condition and their suitability for my purposes and I agree that no warranty condition description or representation on your part is given and any express or implied warranty or condition as to the quality fitness safety or road worthiness or otherwise of the goods prior to or at any time during the continuance of the lease is hereby excluded and my obligations to pay rent and otherwise hereunder shall continue notwithstanding the occurrence of any defect or breakdown in the goods.

We are dealing with a lease of personal property as opposed to real property and on which there has been no attempt to enact legislation to regulate the leasing thereof as in the case of real property by the National Land Code. It is classified in English Law as a type of bailment and is subject to the rules of common law. It is distinguished from hire-purchase agreements which are under statutory provisions (Hire Purchase Act 1967). Unlike a lease, a hire-purchase agreement includes an option to purchase and possesses elements of sale. It is not a contract of bailment pure and simple. The dividing line between a hire-purchase and a financial lease is whether or not the lessee may become the owner of the leased equipment. (See *Leasing* by T.M. Clark).

A lease is defined as a contract between a lessor and lessee for the hire of a specific asset selected from a manufacturer or vendor of such assets by the lessee. The lessor retains ownership of the asset. The lessee has possession and use of the asset on payment of specified rentals over a period. A lease may be specified as a financial lease or an operating lease. Judging from the terms and conditions in the light of the main characteristics, the present case is a financial lease.

At common law, it is usual to exclude the lessor from contractual liability arising from the implied terms as to fitness and quality. This is because the equipment is selected from the manufacturer or distributor by the lessee who requests the lessor to buy it and then lease it to him. The lessee takes on the responsibility of checking the condition of the equipment at the time of delivery and normally accepts it on the lessor's behalf. The lessor gives no warranty to the lessee as to the fitness of the equipment, but where there is no direct contractual arrangement between the lessee and the supplier, there is normally provision in the lease for action to be taken by the lessor on the lessee's behalf against the supplier. (See *Leasing* by T.M. Clark, pages 72, 83 & 84). This is required because since the lessor is the buyer and the legal owner of the goods, he has privity of contract with the manufacturer or supplier. Under the Sale of Goods (Malay States) Ordinance (No. 1 of 1957), there is an implied warranty or condition as to quality and fitness of goods supplied under certain contracts of sale. There is also an implied condition that the goods shall correspond with the description. (See sections 15 and 16). In case of any breach of warranty, section 59 provides remedy to the appellant as the buyer not only to reject the goods but also to set up

the breach by diminishing or extinguishing the price or sue the seller for damages for breach.

In the present lease, as between the respondents and the appellant, no warranty or condition as to quality or fitness of the machine is given by the latter who is also excluded by clause 9 from contractual liability in case of any defect or breakdown. There is, however, no clause to safeguard the interest of the respondents against the supplier in case of any breach of warranty or condition as explained earlier. In our considered judgment, the clause should have been included in the lease requiring the appellant to take necessary action on behalf of the respondents.

Even without its inclusion, we are of the view the appellant ought to seek a remedy against the supplier of the machine. According to the facts, it cannot be disputed that the machine was seriously defective and not functioning properly in spite of unsuccessful attempts to remedy it by repairs and change of spare parts. The defect started two days after its delivery, and the circumstances clearly indicate the defect was latent and not patent or such as may be discovered by ordinary vigilance on the part of a purchaser. There was therefore more than sufficient ground for the appellant to have taken action against the supplier for damages. In the circumstances, the respondents were not obliged under clause 9 to continue paying the total rental specified in the schedule. The respondents' liability as stated in the last limb of the clause should be construed as to refer to any defect or breakdown caused by any act or negligence on the part of the respondents, their servants or agents and not for any defect for which the manufacturer or supplier is responsible. Similarly, the warranty by the respondents as to the satisfactory condition and suitability of the machine refers to its condition as is discovered by ordinary vigilance on examination but does not extend to any concealed or latent defect. The above, in our view, is consonant with the real intention of the parties in the light of the facts and circumstances of the case.

It was also conceded that the appellant had committed a breach of clause 8 in failing to dispose of the machine by means of a *bona fide* sale according to the stipulation therein. It was sold to a motorcar firm in Melaka. The appellant explained the difficulty in getting a *bona fide* buyer. We do not think it was an impossibility but it might require extra effort and time. That, in our view, is not a reasonable excuse for contravening the agreement. The appellant has no doubt abandoned its claim under this clause, but it does not dispel the fact that it has committed a breach.

For the above reasons, we confirm the decision of the learned Judge and dismiss the appeal with costs. The deposit is to be paid to the respondents on account of costs.

Appeal dismissed.

Solicitors: *Skrine & Co.; D.P. Vijandran & Associates.*

KUAN TED FATT v. PUBLIC PROSECUTOR

[F.C. (Seah, Mohamed Azmi & Syed Agil Barakbah F.JJ.) October 1 & 2, 1984]

[Kuching – Federal Court Criminal Appeal No. 37 of 1983]

Criminal Law and Procedure – Charge of murder – Defence of grave and sudden provocation and sudden fight – Whether witness an accomplice – Trial with assessors – Assessors arbiters of fact – Penal Code, s. 300 Exception 1 – Criminal Procedure Code, Chapter XXI.

Evidence – Accomplice – Whether witness an accomplice.

In this case the appellant was convicted of the murder of one Bojeng bin Boyong in a trial with assessors and was sentenced to death. He appealed against his conviction. The facts were that a few days before the tragic incident the appellant alleged that the deceased had committed rape on his mistress, Ponny. On the day of the incident the deceased came to the appellant's home and invited Ponny to see a movie. Under the pretext of going to the cinema, the appellant together with Ponny, his daughter and his house guest, Fam Kui Hian went into the deceased's car. On the way the appellant said he changed his mind and asked Ponny and his daughter to alight so that they could take a bus home. The appellant then directed the deceased to drive in the direction of Muara Tuang as he wanted to visit his sick mother. After parking the car in a side road and in the presence of Fam Kui Hian the appellant asked the deceased why he raped Ponny. The deceased was alleged to have answered "If I have raped your wife, so what?" On hearing this reply the appellant alleged that he lost his temper and proceeded to assault the deceased. During the fist fight the appellant used a knife to stab the deceased. Although the appellant admitted he inflicted the bodily injuries which resulted in the death of the deceased he claimed that the culpable homicide did not amount to murder by reason of grave and sudden provocation or alternatively that the act was committed without